

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MARVIN JOHNSON,	)	
	)	
Plaintiff(s),	)	No. C06-4217 MMC (BZ)
	)	
v.	)	<b>ORDER DENYING PLAINTIFF'S</b>
	)	<b>MOTION FOR A PRECLUSIONARY</b>
CITY AND COUNTY OF SAN	)	<b>SANCTION</b>
FRANCISCO, et al.,	)	
	)	
Defendant(s).	)	
_____	)	

Plaintiff's Motion to Compel Discovery and for Sanctions came on for hearing on August 31, 2007. In part, plaintiff complained that defendant the San Francisco Giants refused to designate a Rule 30(b)(6) witness to testify as to the affirmative defenses included in its answer to the amended complaint.

Federal Rule of Civil Procedure 37(a)(2)(B) states that if a party fails to make a designation under Rule 30(b)(6), the discovering party may move for an order compelling a designation. A preclusionary order such as plaintiff seeks is available only when a party fails to comply with a court order to provide or permit discovery, Fed. R. Civ. P. 37(b)(2)(B),

1 or when a person designated under Rule 30(b)(6) fails to  
2 appear. Fed. R. Civ. P. 37(d); see also Federal Civil  
3 Procedure Before Trial §§ 11:159, 11:192, 11:193 (The Rutter  
4 Group, 2007). Per subdivision (d), "a party may not properly  
5 remain completely silent even when he regards a notice to take  
6 his deposition ... as improper and objectionable. If he  
7 desires not to appear or not to respond, he must apply for a  
8 protective order." Advisory Committee Notes to Rule 37(d),  
9 1970 Amendment.

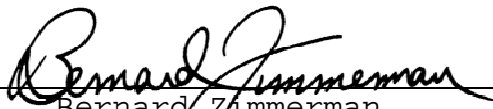
10 Preclusionary sanctions are not warranted. Plaintiff  
11 noticed the deposition at issue on June 26, 2007 to take place  
12 on June 29, 2007. See Leigh Supp. Decl. ¶ 3, Exh. A (Docket  
13 No. 143). By letter dated June 27, 2007, the Giants  
14 registered their objections to noticing their affirmative  
15 defenses as deposition topics. See id. at ¶ 4, Exh. B. The  
16 letter went on to state that the Giants did not consider there  
17 to be enough time to meet and confer and pursue a protective  
18 order prior to the June 29 date, and suggested a meet and  
19 confer session for the following day.

20 Although the Giants did not file a motion for protective  
21 order, they did not remain "completely silent" in the face of  
22 the notice. Thus, the propriety of granting sanctions under  
23 Rule 37(d) is questionable. In any event, considering the  
24 harshness of the preclusionary sanction requested, I do not  
25 consider it commensurate with the Giants' alleged misdeeds.  
26 See, e.g., Navellier v. Sletten, 262 F.3d 923, 947-48 (9<sup>th</sup>  
27 Cir. 2001) (determining that the court could not say that  
28 sanction under Rule 37(b)(2)(A) was not commensurate with the

1 party's misconduct).

2 On these facts, I would likely have ordered the Giants to  
3 designate a 30(b)(6) witness on at least some of the topics  
4 noticed and perhaps awarded plaintiff some attorney's fees.  
5 Plaintiff, however, stated clearly he did not seek a  
6 deposition; he sought only a preclusionary order. For the  
7 reasons discussed, plaintiff's request for a sanction  
8 precluding the Giants from presenting factual evidence  
9 supportive of its affirmative defenses is **DENIED**.

10 Dated: September 4, 2007

11   
12 Bernard Zimmerman  
United States Magistrate Judge

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